Stein, Ralph M

Supreme Court. *Cf.* Perrin v. United States, 4 Ct. Cl. 543 (1868).

[39] 67 U.S. (2 Black) 635, 665 (1862), involving suits by four ship owners alleging their ships had been illegally seized as prizes under President Lincoln's blockade against the Confederacy. The Court held the blockade legal. Mr. Justice Nelson and three others dissented, arguing that the President had no authority to impose a blockade and seize the property of U.S. citizens without a congressional declaration of war.

[40] 343 U.S. 579 (1952).

[41] Concurring opinions of Mr. Justice Frankfurter, *id.* at 604–09; Mr. Justice Burton, *id.* at 655–60; Mr. Justice Clark, *id.* at 662–65.

[42] *See* E. Corwin, The President: Office and Powers 1787–1957, at 259 (1957): "Actually Congress has never adopted any legislation that would seriously cramp the style of a President who was attempting to break the resistance of an enemy or seeking to assure the safety of the national forces."

[43] 71 U.S. (4 Wall) 2 (1866). The case arose as a *habeas corpus* proceeding contesting the legality of a conviction by a military tribunal of a Northern civilian in Indiana during the Civil War. The Court invalidated the conviction, holding that the military tribunal had no jurisdiction, since neither the Congress nor the President could constitutionally authorize the trial of a civilian before a military tribunal in a State which had been loyal to the Union during the Civil War. *Id.* at 118–22.

[44] *Id.* at 139.

[45] Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 637. In an early case involving seizure of vessels on the high seas it was held that the President could not act inconsistently with a specific legislative prohibition. Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804) involved the seizure of a ship sailing *from* a French port which was made in accordance with presidential orders interpreting the Act of 1799 (which only provided for seizure of ships bound *to* French ports). Chief Justice Marshall, for a unanimous Court, held the seizure unlawful, but noted in passing that the presidential order might well have been lawful in the absence of congressional authorization were it not for the express negation of authority contained in the Act. *See also,* the concurring opinion of Mr. Justice Clark in Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 660–61.

The Flying Fish involved an issue squarely within the specific grant of authority to Congress "to make Rules concerning Captures on Land and Water," [U.S. Const. art I, § 8] and for this reason should not be considered authority for congressional predominance in an area of shared powers, such as the war powers. Moreover, *The Flying Fish* was decided before the doctrine of "political questions" was formulated by Chief Justice Marshall in Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) and, therefore, although it has never been overruled, a similar case would probably never reach decision on the merits today.

[46] 299 U.S. 304 (1936). *See also,* Martin v. Mott, *supra,* involving an Act of Congress of 1795 which delegated authority to the President to call forth the militia in the event of an invasion or the imminent threat thereof.

[47] *Id.* at 319–22. The *Curtiss-Wright Case* is more often cited for the Court's dicta than its holding. The Court saw the foreign affairs powers as inherent attributes of national sovereignity and, consequently, vested exclusively in the federal government, to be exercised by the President as "the sole organ of the nation in its external relations." The Court suggested that this "very delicate, plenary and exclusive power of the President" with respect to foreign relations did not depend upon congressional authorization, although like every other governmental power it had to be exercised in subordination to the applicable provisions of the Constitution. *Id.* at 320. The case holding has been interpreted as withdrawing "virtually all Constitutional limitation upon the scope of Congressional delegation of power to the President to act in the area of international relations." Jones, The President, Congress and Foreign Relations, 29 Calif. L. Rev. 565, at 575 (1941). *But see* recent Supreme Court decisions which contain warnings that the *Curtiss-Wright* holding may not be followed should a similar set of facts arise in the future. Afroyim v. Rusk, 387 U.S. 253 (1967); Zemel v. Rusk, 381 U.S. 1 (1965); Reid v. Covert, 354 U.S. 1 (1957).

[48] *See* Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 635 n. 2.

[49] *See, e.g.,* Richard M. Nixon, President of the United States, United States Foreign Policy for the 1970's—Building for Peace, Rep. to Cong., Feb. 25, 1971, pp. 10–21; United States Foreign Policy 1969–70, Rep. of the Secretary of State, Mar. 26, 1971, at II, 36–39.

[50] *See* The Federalist No. 64, at 435–36 (J. Hamilton ed. 1864) (J. Jay); *id.* No. 74, at 552 (A. Hamilton); *id.* No. 75, at 559 (A. Hamilton).

[51] Reveley, Presidential War Making: Constitutional Prerogative or Usurpation?, 55 Va. L. Rev. 1243, at 1271 (1969).

[52] *See* R. Neustadt, Presidential Power: The Politics of Leadership (1960): "The President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. Here is testimony that despite his "powers" he does not obtain results by giving orders—or not, at any rate, merely by giving orders. He also has extraordinary status, *ex officio,* according to the customs of our government and politics. Here is testimony that despite his status he does not get action without argument. Presidential power is the power to persuade." *Id.* at 23.

[53] Richard M. Nixon, Rep. to Cong., Feb. 25, 1971, *supra* at 16.

[54] *See, e.g.,* S.J. Res. 18, 92d Cong., 1st Sess. (introduced by Sen. Taft Jan. 27, 1971); S. 731, 92d Cong., 1st Sess. (introduced by Sen. Javits Feb. 10, 1971); S.J. Res. 59, 92d Cong., 1st Sess. (introduced by Sen. Eagleton Mar. 1, 1971); S.J. Res. 95, 92d Cong., 1st Sess. (introduced by Sen. Stennis May 11, 1971).

[55] S. 731, *supra,* would only authorize the President to use the armed forces, in the absence of a declaration of war, in four specific situations: (1) to repel a sudden attack against the U.S., is territories, and possessions; (2) to repel an attack against U.S. armed forces on the high seas or lawfully stationed abroad; (3) to protect the lives and property of U.S. nationals abroad; and (4) to comply with a "national commitment" as defined in S. Res. 85, 91st Cong., 1st Sess. (1969). S.J. Res. 59, *supra,* would limit unauthorized presidential military action to (1) repelling an attack on the U.S.; (2) repelling an attack on U.S. armed forces; and (3) withdarwing U.S. citizens from countries where their lives are subjected to an imminent threat.

[56] S. 731 and S.J. Res. 95, *supra.*

[57] S. 731, S.J. Res. 59, and S.J. Res. 95, *supra.*

[58] Formal declarations of war are often deliberately avoided because they tend to indicate both at home and abroad a commitment to total victory and may impede settlement possibilities. The issuance of a formal declaration also has certain legal results: treaties are suspended trading, contracts and debts with the enemy are suspended; vast emergency powers become operative domestically; and the legal relations between neutral states and belligerents are altered. *See* Eagleton, the Form and Function of the Declaration of War, 33 Am. J. Int'l L. 19–20, 32–35 (1938). On the other hand, Professor Moore argues that: "probably the most compelling reason for not using a formal declaration . . . is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out '[T]here has not been a formal declaration of war—anywhere in the world—since World War II.'" Moore, The National Executive and the Use of the Armed Forces Abroad, 21 Nav. War. Col. Rev. 28, at 33 (1969). *See generally,* J. Maurice, Hostilities Without Declaration of War (1883).

[59] Docs. on the War Power 1970, *supra* at 32.

[60] 117 Cong. Rec. at S6616 (daily ed. S. Jour. May 11, 1971).

ERVIN HEARINGS ON PRIVACY II—TESTIMONY OF RALPH M. STEIN

Mr. ERVIN. Mr. President, a few days ago I announced my intention to place in the CONGRESSIONAL RECORD some of the prepared statements submitted for the recent hearings by the Subcommittee on Constitutional Rights on Computers, Data Banks, and the Bill of Rights.

Today I would like to include in the RECORD excerpts from the testimony of Mr. Ralph M. Stein. Mr. Stein, another former Army intelligence agent, engaged in domestic intelligence analysis work from July 1967, through October 1968. His excellent testimony describes how the intelligence collected by the Army was analyzed, what it was used for, and how the operation was conducted. His statement also lists the wide range of citizens and groups against whom the Army's civil disturbance intelligence program was directed.

I ask unanimous consent that excerpts from the statement of Mr. Stein be printed in the RECORD at this point.

There being no objection, the excerpts were ordered to be printed in the RECORD, as follows:

STATEMENT OF RALPH M. STEIN

Mr. Chairman and Members of the Subcommittee: The intrusive presence of military intelligence in civilian affairs constitutes a grave challenge to the American tradition of military-civil separation and poses urgent Constitutional questions. I am happy to have this opportunity to discuss my experience in serving with and later investigating the activities of military intelligence.

I would like to present my background first. Prior to entering the U.S. Army, I was a history major for three and a half years at Long Island University in Brooklyn, New York. I am currently attending the New School for Social Research in New York where I will receive my B.A. degree in May. I hope to attend law school in the fall.

I served in the U.S. Army from October 22, 1965 to October 21, 1968 and was honorably discharged as a sergeant. After basic training I attended the U.S. Army Intelligence School at Fort Holabird, Baltimore, Maryland, and graduated from the military intelligence specialist course in April 1966. I served as a special agent in the Investigations Section, Company B, 502d Military Intelligence Battalion, Republic of Korea, from May 1966 to June 1967. After returning from Korea I was assigned to the Counterintelligence Analysis Branch, Counterintelligence Division, Directorate of Security, Office of the Assistant Chief of Staff for Intelligence (ACSI), from July 1967 until my discharge, serving for all but the first few days of my assignment in the Domestic Intelligence section of CIAB. I received a certificate of commendation from the Assistant Chief of Staff for Intelligence at the time of my discharge. I was cited for excellence in domestic intelligence analysis work at CIAB.

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